LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
MAR 20 1958
JOHN T. FEY, Clerk

In the Supreme Court of the United States

No. 863

OCTOBER TERM, 1957.

EMIL JACK PORCHETTA,

Appellant,

vs.

STATE OF OHIO,

Appellee.

JURISDICTIONAL STATEMENT.

HENRY LAVINE,
1000 Marshall Building,
Cleveland, Ohio,
Counsel for Appellant.

TABLE OF CONTENTS.

Opinions Below 1

Jurisdiction 1

Questions Presented 3

Statement of the Case 4

Argument 5

This Case Is Within the Jurisdictional Provisions Relied on and the Cases Cited to Sustain Jurisdiction 11

Conclusion 12

APPENDIX:

Judgment of the Court of Appeals of Cuyahoga County, Ohio 13

Order of the Supreme Court of Ohio Dismissing Appeal 13

Order of the Supreme Court of Ohio Denying Application for Rehearing 14

TABLE OF AUTHORITIES.

Cases.

Lambert v. State, 25 So. 2d 477, 199 Miss. 790 11

Norfolk & Suburban Turnpike Co. v. Commonwealth of Virginia, 225 U. S. 264 (1912) 12

Yarbrough v. State, 12 So. 551, 70 Miss. 593 11

Constitution of the United States.

Fourteenth Amendment 10

Statutes.

Ohio Revised Code:

Sec. 2901.16 ..... 1, 2

Sec. 2945.43 9

28 U. S. C. 1257(2) 2, 11

In the Supreme Court of the United States

No. _____.

OCTOBER TERM, 1957.

EMIL JACK PORCHETTA,

Appellant,

vs.

STATE OF OHIO,

Appellee.

JURISDICTIONAL STATEMENT.

Emil Jack Porchetta, the appellant above named, hereby appeals to the Supreme Court of the United States from the final Order of the Supreme Court of Ohio dated October 30th, 1957, denying a Petition for Rehearing on a Motion for Leave to Appeal, and Appeal on Constitutional Question, which was denied on October 9th, 1957, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW.

No opinions were rendered by the trial or reviewing courts.

JURISDICTION.

The State of Ohio brought the action which is the subject of this appeal in the Criminal Division of the Common Pleas Court of Cuyahoga County, Ohio. The indictment of this case was based on Ohio R. C. 2901.16 (12412):

"*Attempt to Procure Abortion.* No person shall prescribe or administer a medicine, drug or substance, or use an instrument or other means with intent to procure the miscarriage of a woman, unless such miscarriage is necessary to preserve her life, or is advised by two physicians to be necessary for that purpose.

"Whoever violates this section, if the woman either miscarries or dies in consequence thereof, shall be imprisoned not less than one year nor more than seven years."

This appeal is being taken under Rule 10 of the Rules of the Supreme Court of the United States and jurisdiction is conferred upon this Honorable Court by virtue of the terms of Section 1257(2) of 28 U. S. C., which provide as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The defendant-appellant was convicted on March 13, 1956, in a trial before a Jury in the Common Pleas Court of Cuyahoga County, Ohio, on an indictment which charged him with the violation of Section 2901.16, Revised Code of Ohio, in that he caused a miscarriage of a woman. The defendant did not testify, and offered no evidence as to his character or reputation. He was found guilty and sentenced to the Ohio State Penitentiary for an indeterminate sentence from one to seven years. A motion for a new trial was overruled. An appeal was taken to the

Court of Appeals for Cuyahoga County, and the judgment of the Common Pleas Court was affirmed.

A motion for leave to appeal, and appeal on constitutional question, was filed in the Supreme Court of Ohio, and was denied as alleged above. The defendant was admitted to bail in the sum of $5,000.00. Presently the defendant-appellant is confined in the Ohio Penitentiary at Columbus, Ohio.

QUESTIONS PRESENTED.

1. (a) In this case where the defendant's good character and reputation was not first introduced by him in the case and he did not take the witness stand in his own behalf, was it prejudicial error on the part of the prosecutor to tell the Jury in final argument that the reason the defendant did not take the stand was, because he wanted to hide from the Jury "his past history" and "whether or not he has a record"?

Our answer is: It is prejudicial and reversible error.

(b) Was such error cured by the Court's ruling on the second objection by merely saying, "The Jury will disregard that"?

Our answer is: No, such error is not cured merely by such remark, and the "due process" clause of the United States Constitution was violated.

2. Whether unrestricted and unlimited comment by Prosecutor in argument to Jury on the failure of defendant to take the witness stand in his own behalf and when during such argument the Prosecutor accused the defendant that the reason for his failure to take the witness stand is that the defendant probably did so with the intent and purpose to conceal from the jury a criminal record.

Our answer is: That such conduct constitutes a failure of due process and a violation of defendant's constitutional rights and therefore is prejudicial and reversible error.

STATEMENT OF THE CASE.

On or about the latter part of February, 1955, Virginia Allen, who was then 19 years old, missed her normal menstrual period. She then went to see Dr. Edmund H. Schroeder on or about March 31, 1955, and he advised her to have a Friedman test at Lakewood Hospital (R. 89). The test was reported to Dr. Schroeder by the laboratory at the Hospital as being positive for pregnancy (R. 90).

Virginia Allen then testified that she discussed the pregnancy with her boy friend, Andrew Martin, and as a result of this discussion Mr. Martin got in touch with Emil Jack Porchetta, the defendant, on May 11, 1955 (R. 41). Upon meeting with the defendant Mr. Martin explained that Miss Allen was pregnant. The defendant indicated he could take care of it for a price of $300.00 (R. 43).

She further testified that on May 13, 1955, the defendant met with Miss Allen and Mr. Martin at Mr. Martin's apartment at 5413 Knollwood Drive, Parma, Ohio. The conversation while all three were present was that the defendant explained that all he would do that evening would be some packing and he would come back the following evening to complete the operation (R. 46). Afterwards the defendant and Miss Allen went into the bedroom of the apartment, where the defendant packed Miss Allen's uterus with cotton (R. 24). On May 14, 1955, the defendant returned to the Martin apartment, removed the packing from the uterus (R. 26) and with a tool irritated the

uterus (R. 27) and removed the foetus (R. 28). He showed the foetus to Miss Allen (R. 29).

Dr. John H. Sanders testified that he first saw Miss Allen at the Fairview Park Hospital emergency room (R. 69), that his findings upon examination of Miss Allen were those of recent pregnancy and of infection (R. 72), and that the abortion was complete (R. 73).

Captain Edwin W. Speller of the Parma Police Department testified that on May 19, 1955 he went to Fairview Park Hospital and saw Virginia Allen; that he then went to the home of the defendant and talked with the defendant about Miss Allen's condition, stating that she had accused the defendant of having performed the abortion (R. 99). Defendant made no reply. The defendant was asked about the tools used in the performance of the abortion, and the officers then went to the defendant's barbershop, where the police officer obtained certain instruments. The officer testified that the defendant was then taken to Fairview Park Hospital to see Miss Allen, who identified him as being the man who had performed the abortion on her (R. 102).

The defendant failed to take the stand or to present any witnesses in his behalf after the State had rested its case.

ARGUMENT.

There was misconduct on the part of the Prosecutor in his final argument to the Jury, which deprived the defendant of his rights to a fair and impartial trial under the Constitution of Ohio and under Constitution of the United States.

The Court of Appeals erred in affirming the judgment of conviction entered herein.

For other errors apparent on the face of the Record.

The question if Porchetta involves a Federal question seems to us to be clear because it is our claim that in this case constitutional Amendment 14 was violated because of the actions of the Assistant County Prosecutor in addressing a Jury in the trial Court of this case. We believe that, where a prosecutor in commenting on failure of a witness to take the witness stand in his own defense extends his remarks as far as this prosecutor did in this case, the bringing of a Guilty verdict by this Jury cannot then be subdivided and analyzed to ascertain whether or not the Guilty verdict stems more from the other evidence that was introduced in the case against this Defendant, or less from the improper remarks and statements that were made by this Prosecutor which, as we claim, inflamed the minds of the Jury.

We do realize that the State of Ohio does have a statute which permits comment by the Prosecutor upon the failure of a Defendant to take the witness stand, and we also know that the Federal law prohibits the Prosecutor or the District Attorney from commenting in any way or hinting at the failure of the Defendant to take the witness stand in his own behalf. Knowing that, we do realize that the prosecutor did have the right to go a reasonable distance and use reasonable expressions in reminding the Jury that this Defendant failed and refused to take the witness stand. We say "reasonable" because the mere reminding of such fact during argument before the Jury would not, in itself, cause great damage to a Defendant and would satisfy the law permitting comment to the Jury of such failure on the part of the defendant. And while comment is permissible, it certainly is not permissible to go steps further after commenting on such failure to take the witness stand, and begin to draw conclusions and reasons why the defendant failed to take the witness stand.

When one goes that far, he is now beginning to guess and double-guess and out-guess himself by trying to conjure up reasons or possible reasons for such failure and, of course, he will present to the Jury phantasy rather than facts, guesswork rather than actual occurrences, in fact anything that in his opinion will damage and injure the defendant in his reputation and thereby also his chances of getting a fair trial at the hands of that Court.

A mere reflection is all that is necessary when one reviews the heated statements made by this Prosecutor during argument, accusing this defendant of failing and refusing to take the witness stand because he, the said defendant, desired to hide and keep from the notice of this Jury the fact that he, this Defendant, probably had a previous criminal record. Such a statement on the part of the Prosecutor at this stage of a case definitely amounts to a lack of due process because there was no evidence of any previous criminal record in this case until that thought was injected into the minds of the Jury, and when such a statement is made to them there is no question but that such thought and statement will remain in their minds continuously throughout the remainder of the case and throughout their entire deliberations.

The Prosecutor repeated on several occasions: "What is he trying to hide from tne Jury?" and then followed it up by his suggested reason for the Defendant's failure to take the stand because he was trying to hide a previous criminal record from the Jury. That, to our mind, cannot be cured by a mere instruction or ruling, upon an objection that was offered by Counsel for the Defendant, and the mere statement of the Judge "The Jury will disregard it." That brings us to the second question, namely, was it sufficient on the part of the Judge merely to rule on the objection by saying the Jury will disregard it, or should the

Judge have gone further, yes, much further than that mere weak instruction.

In our opinion, the Prosecutor committed reversible error, the statement was so damaging and was not based on any evidence, had no right to be in the case, and the Prosecutor had no right to resort to it, and all of this was known to the Trial Judge at that time, and also the fact that it was greatly damaging was known to the Judge at that very time. Therefore, was it not the Judge's duty to stop the proceedings, to instruct the Prosecutor that his conduct was improper, that he had no right to make such a statement, that he should retract such a statement from the Jury and that such conduct on his part was, to say the least, reprehensible.

Also, was it not the duty of the Trial Judge there and then to tell the Jury that such conduct on the part of the Prosecutor was improper, unfair and unjust; and not based on any evidence, and that they should therefore not consider it for a moment in their deliberations, and that they should dismiss such thoughts from their minds when they start their deliberations because it is not for the Prosecutor to out-guess anyone as to any reason for certain testimony unless there is evidence in the case to substantiate such argument, and inasmuch as in this case there was nothing upon which he could base such assertions except his own desire to damage and injure the Defendant's chances before the Jury, that he was wrong in doing so, and that they should therefore again not record his remarks or not even remember them.

The Judge should also have instructed the Jury that the defendant has a right not to take the witness stand in his own behalf if he so desires, and that that is a legal right that is granted him by the laws of the State of Ohio.

Although the prosecutor does have a right to comment on it, such comment must be contained within a very limited space and is not an unlimited grant for a prosecutor to begin to use his imagination in order to inflame the minds of the Jury against such a defendant.

Even then, it is greatly doubted if such inflaming remarks as that the defendant is probably attempting to hide a previous criminal record by not taking the witness stand could ever be removed from the minds of the Jury, but at least an effort would have been made by the Trial Judge, if the Prosecutor would then have withdrawn such remarks from the Jury. But leaving the case as this Judge left it by merely making a remark "The Jury will disregard it" is certainly far from the conduct that should have taken place to provide a fair and impartial trial to this defendant in accordance with the due process clause of the Constitution of the United States.

Ohio law on that question is as follows:

2945.43 (13444-3) *Defendant may testify:*

"On the trial of a criminal cause, a person charged with an offense may, at his own request, be a witness, but not otherwise. The failure of such person to testify may be considered by the Court and Jury and may be made the subject of comment by Counsel."

The Constitution of the United States prohibits any action on the part of any official be he Judge or prosecutor which, if engaged in by such official, would or could prevent the defendant from having a fair trial at the hands of the triers of the case, and of course that would amount to a lack of "due process" and would therefore be unconstitutional, and would of course be in violation of the defendant's rights and result in a lack of due process of law.

We contend that when the prosecutor made these remarks accusing the defendant of hiding facts from the jury that he did not want them to know, and accusing him of concealing a probable record (criminal record), it is our belief that thereby he then and there deprived this defendant of a fair trial and hearing before this jury, and in that way the defendant's rights were violated and particularly his constitutional right to a fair hearing in accordance with due process of law, in violation of the 14th amendment of the U. S. constitution.

In the State of Ohio, the prosecuting attorney does have the right to comment on the failure of a defendant to take the witness stand in his own behalf. However, as is shown in nearly every citation in various States as well as Federal Government, the word "comment" itself does not denote criticism and condemnation, and wherever the word "comment" is used it cannot and should not be mistaken for criticism and wrong accusation. Therefore, in a State like Ohio where comment is permissible, it of course means comment within reasonable bounds, and is certainly not a limitless grant to the prosecutor to indulge in all kinds of guesswork and resort to criticism and fault-finding and libelling and slandering.

In that connection, the interpretation of the word "comment" as not being a criticism becomes very important because, in the case of Porchetta, the prosecutor did nothing else but criticize, guess, libel and slander, and use every possible means to advise the jury that the defendant is dishonest, that he did not take the witness stand because he wanted to conceal from them certain facts and probably a criminal record. When one realizes that not a word of that was brought out in the evidence against this defendant, it becomes immediately apparent that the prosecutor did resort to criticism, accusation and slander and libel.

because none of his statements were based upon any evidence brought out into the record, and therefore he resorted to guessing and second-guessing without limit.

The word "comment," prohibiting comment by counsel on accused's failure to testify does not mean to criticize or condemn. It forbids any comment, friendly or unfriendly, or any remark upon the failure of the accused to testify. *Lambert v. State*, 25 So. 2d 477, 478, 199 Miss. 790.

A statute declaring that counsel for the state in a criminal prosecution shall not comment on the failure of the accused to testify does not mean that the counsel shall not criticise or condemn or anathematize the accused but it forbids in unmistakable language any reference, friendly or unfriendly, to his failure to testify. It forbids any remark, of any character or in any words, on such failure, and requires that the attention of the jury shall not be called to the fact at all by counsel. *Yarbrough v. State*, 12 So. 551, 70 Miss. 593.

THIS CASE IS WITHIN THE JURISDICTIONAL PROVISIONS RELIED ON AND THE CASES CITED TO SUSTAIN JURISDICTION.

This appeal is taken pursuant to 28 U. S. C. A., Section 1257(2). That section confers appellate jurisdiction on this Court to review final judgments rendered by the highest court of a State in which a decision could be had when there is drawn in question the validity of a statute of the State on the grounds of its being repugnant to the Constitution, and the decision of the State court is in favor of validity.

As previously noted, the Supreme Court of Ohio denied the writ of certiorari to the Cuyahoga County Court of Appeals and dismissed the petition. The general rule is that where the order of the higher court amounts to an

affirmance of the intermediate court decision, the appeal is to be taken from the higher court ruling. *Norfolk & Suburban Turnpike Co. vs. Commonwealth of Virginia,* 225 U. S. 264 (1912). In the instant case, however, the ruling of the Ohio Supreme Court which denied the writ and dismissed the petition did not amount to an affirmance on the merits. It was a refusal to hear and determine the merits.

It is clear, therefore, that the Ohio Supreme Court refused to hear the case on the merits. Accordingly, pursuant to existing Supreme Court authority the appeal is from the judgment of the Cuyahoga County Court of Appeals.

CONCLUSION.

Defendant-appellant respectfully suggests that this appeal brings before the Court Federal questions under the Constitution which are far-reaching and important in terms of legal principles and important to jury trials in criminal cases, and that the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral arguments for the resolution.

Respectfully submitted,

HENRY C. LAVINE,
1000 Marshall Building,
Cleveland, Ohio,
Attorney for Defendant-Appellant.

APPENDIX.

Judgment of the Court of Appeals of Cuyahoga County, Ohio.

Jan. 23, 1957. To Court:—This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties; and upon consideration of all the errors assigned, the Court finds no error prejudicial to the appellant and therefore the judgment of the Court of Common Pleas is affirmed.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts. /s/ Julius M. Kovachy, Presiding Judge. (Journal 21, page 29.)

Order of the Supreme Court of Ohio Dismissing Appeal.

(Entered October 9, 1957.)

Journal 42, Page 400.
Appeal from the Court of Appeals of Cuyahoga County.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, upon the motion of the Appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellant its costs herein expended, taxed at $

ORDERED, That a special mandate be sent to the Court of Common Pleas of Cuyahoga County, to carry this judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County, "for entry."

Order of the Supreme Court of Ohio Denying Application for Rehearing.

(Entered October 30, 1957.)

Journal 42, Page 420.

Application for Rehearing.

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.